

No. 11114

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation, and IRA BOONE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Page

Answer	5
Appeal:	
Desigantion of Record on.....	39
Notice of	33
Statement of Points Upon Which Appellants Intend to Rely on.....	39
Stipulation as to Record on Appeal.....	34
Certificate of Clerk.....	37
Complaint	2
Decision	25
Designation of Record on Appeal.....	39
Exhibit: Defendants' A. (Release in Full).....	9
Findings of Fact and Conclusions of Law.....	27
Judgment	32
Letter, Dated June 8, 1945, to Judge Leon R. Yank- wich	26
Names and Addresses of Attorneys.....	1
Opinion	10
Release in Full (Defendants' Exhibit A).....	9
Stipulation of Fact.....	8
Notice of Appeal.....	33
Statement of Points Upon Which Appellants Intend to Rely on Appeal.....	39
Stipulation as to Record on Appeal.....	34

	Page
Proceedings in U. S. C. C. A., Ninth Circuit.....	40
Order of submission.....	40
Order directing filing of opinion and judgment.....	40
Opinion, Bone, J.....	41
Judgment.....	48
Order denying petition for rehearing.....	49
Clerk's certificate.....	49
Order allowing certiorari.....	50

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

JENNINGS & BELCHER

808 Security Building

510 South Spring St.

Los Angeles 13, Calif.

For Appellee:

CHARLES H. CARR

United States Attorney

RONALD WALKER and

CAMERON L. LILLIE,

Assistant U. S. Attorneys

600 U. S. Post Office and Court House Bldg.

Los Angeles 12, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 4204-Y Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STANDARD OIL COMPANY of California, a corporation,
and IRA BOONE,

Defendants

COMPLAINT

The United States of America by Charles H. Carr,
United States Attorney for the Southern District of California,
and Ronald Walker and Cameron L. Lillie, Assistant United States Attorneys for said district, alleges:

I.

That this action is brought in the above entitled court pursuant to the provisions of Title 28, Section 41(1) U. S. C. A. by reason of the fact that the United States of America is named herein as plaintiff.

II.

That during all of the times herein mentioned the defendant Standard Oil Company of California was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and said corporation has complied with the laws of the State of California so as to entitle it to do business in said state; that defendant Ira Boone is a resident of the County of Los Angeles, State of California. [2]

III.

That during all of the times herein mentioned John Etzel was an enlisted man in the armed forces of the United States government, and the servant of the plaintiff.

IV.

That at all times herein mentioned Figueroa Street and Eighth Street were, and now are, public and intersecting streets and highways in the City of Los Angeles, County of Los Angeles, State of California, and within the Southern District of California, Central Division.

V.

That at all times herein mentioned the defendant Standard Oil Company of California, a corporation, was the owner of a certain G.M.C. truck; that at all times herein Ira Boone was acting as the agent, servant and employee of the other defendant herein, and operating, driving and using the said G.M.C. truck in the course and scope of his employment.

VI.

That on or about the 7th day of February, 1944, John Etzel as a pedestrian was crossing Figueroa Street in an easterly direction at the intersection of said Figueroa and Eighth Streets; and that at said time and place John Etzel was at all times within the confines of a marked pedestrian zone; that at said time and place the defendant Ira Boone acting as aforesaid, was driving and operating said G.M.C. truck with the knowledge and consent of the other defendant in a southerly direction on Figueroa Street.

VII.

That at said time and place defendant Ira Boone so carelessly and negligently drove and operated said G.M.C. truck as to cause the same to run into and strike the person of John Etzel, knocking him violently to the pavement and as a direct and proximate result of the carelessness

and negligence of said defendants and each of them, John Etzel received the following permanent injuries; severe injuries to the head, face and left thigh; contusions, lacerations and abrasions of the entire body. [3]

VIII.

That at the time of said accident and prior thereto John Etzel, the servant of the plaintiff, was an able-bodied man and by reason of said accident and as a direct and proximate result of the carelessness and negligence of the defendants and each of them, and the resulting injuries to John Etzel, he became physically unable to pursue his work and duties or any work and duties during the period from February 7, 1944 to March 6, 1944, and as a result thereof the services of John Etzel were lost to the plaintiff for the aforesaid period, and also by reason thereof the plaintiff became liable to pay, and did pay John Etzel as compensation, salary and wage for the aforesaid period, the sum of \$69.31; that by reason of the injuries sustained by John Etzel the plaintiff has expended for hospital care, the sum of \$123.25, which sum is the fair and reasonable value of the necessary hospital care required by John Etzel as a result of the above mentioned injuries;

Wherefore, plaintiff prays judgment in the sum of \$192.56 and for its costs of suit herein, and such other relief as may be deemed just in the premises.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

CAMERON L. LILLIE

Assistant United States Attorney

[Title of District Court and Cause.]

ANSWER

Come now the defendants above named and answering plaintiff's complaint admit, deny, and allege as follows:

I.

Defendants here answering have no information or belief upon the subject of the allegations contained in Paragraph I thereof sufficient to enable them to make answer thereto, and basing their denial upon the ground of the want of such information and belief, deny generally and specifically each and every allegation therein contained.

II.

Answering Paragraph III these defendants deny that John Etzel was during any of the times mentioned in plaintiff's complaint the servant of plaintiff. Defendants here answering [5] have no information or belief upon the subject of the remaining allegations contained in said Paragraph III thereof sufficient to enable them to answer the same, and basing their denial upon the ground of the want of such information and belief, deny generally and specifically each and every allegation therein contained not herein specifically denied.

III.

Answering Paragraph V these defendants deny that the defendant Ira Boone was the agent of his co-defendant at the times or for the purposes therein alleged or at all.

IV.

Answering Paragraph VI these defendants deny that the said John Etzel was at all times described in plaintiff's

complaint within the confines of a marked pedestrian zone; admit, however, that said John Etzel was immediately prior to the happening of a collision on February 7, 1944 immediately south of the intersection of Eighth and Figueroa Streets, Los Angeles, California.

V.

Deny generally and specifically each and every allegation contained in Paragraph VII of plaintiff's complaint.

VI.

Answering the allegations contained in Paragraph VIII, these defendants have no information or belief concerning certain allegations therein contained sufficient to enable them to answer the same, and basing their denial upon the ground of the want of such information and belief, deny that at the time, alleged or at all, John Etzel was an able-bodied man. Deny generally and specifically each and every allegation contained in Paragraph VIII not herein specifically denied for want of information and belief. Deny that plaintiff has been damaged in any sum or amount whatsoever. [6]

Second Defense

I.

The complaint fails to state a claim against the defendants, or either of them, upon which relief can be granted.

Third Defense

I.

On February 7, 1944 John Etzel so negligently and carelessly failed and neglected to exercise ordinary care for his own safety and so negligently and carelessly proceeded on Figueroa Street near its intersection with

Eighth Street in Los Angeles, California, that he came in collision with a motor vehicle; that any and all injury and damage claimed to have been sustained by plaintiff herein or John Etzel were directly and proximately caused and contributed to by the aforesaid negligence and carelessness of the said John Etzel.

Fourth Defense

I.

That on or about March 16, 1944, for a valuable consideration, John Etzel released and discharged defendants herein and each of them of and from any and all claims and demands on account of or arising out of an accident occurring to said John Etzel at said time and place. That said release has never been rescinded nor disavowed and is still in full force and effect and by reason thereof all claims asserted by plaintiff herein have been fully settled and discharged.

Wherefore, these answering defendants pray that plaintiff take nothing by its complaint herein and ~~that these~~ defendants recover their costs herein incurred.

JENNINGS & BELCHER

By Stevens Fargo

Attorneys for Defendants [7]

[Verified.]

[Endorsed]: Filed Mar. 13, 1945. [8]

[Title of District Court and Cause.]

STIPULATION OF FACT

It Is Stipulated by and between the plaintiff and the defendants herein that upon any trial of the above action the court may deem proved the following:

"That plaintiff has expended for hospital care for John Etzel the sum of \$123.25, which sum is the fair and reasonable value of hospital care necessarily required for John Etzel as a result of certain injuries suffered by John Etzel on or about February 7, 1944."

It is understood and agreed that by making the foregoing stipulation defendants do not stipulate, nor shall it be inferred [9] therefrom, that said plaintiff was required to make such expenditure nor that defendants or any of them were or are liable therefor, either to plaintiff or said John Etzel.

Dated: April 13, 1945.

CHARLES H. CARR

United States Attorney

and

RONALD WALKER and

CAMERON L. LILLIE

Assistant United States Attorneys

By Cameron L. Lillie

Attorneys for Plaintiff

JENNINGS & BELCHER

By Stevens Fargo

Attorneys for Defendants

[Endorsed]: Filed Apr. 24, 1945. [10]

[DEFENDANTS' EXHIBIT A]

RELEASE IN FULL

Received of Standard Oil Co. of Calif. & Ira Boone the sum of Three hundred and 00/100 Dollars (300.00/100)

In consideration of which sum I hereby release and discharge Standard Oil Co. of Calif. & Ira Boone of and from any and all claims and demands which I now have or may hereafter have, on account of or arising out of an accident which occurred on or about the 7th day of Feb., 1944, at 8th & Fig. Street Los Angeles, Calif.

(City or Town) (State)

resulting in injuries to me.

It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.

It is further understood and agreed that the payment of said sum is not, and is not to be construed as, an admission on the part of said payors of any liability whatsoever in consequence of said accident.

Dated at Los Angeles, Calif., this 16 day of Mar., 1944.

John Etzel (L.S.)

This release should not be signed unless read by
or read to the person signing same

T. I. Meredith, Jr.

Witness

Ruth E. Hammond

Witness

1122 Georgia St.

Address.

* * * * *

"1542. / Certain claims not affected by general release.
A general release does not extend to claims which the credi-

tor does not know or suspect to exist in his favor at the time of executing the release which if known by him must have materially affected his settlement with the debtor." [11]

Case No. 4204. U. S. vs. Standard Oil et al. Deft. Exhibit A. Date 4/24/45. Exhibit A in Evidence. Clerk U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk. [12]

[Title of District Court and Cause.]

OPINION [13]

Yankwich, District Judge:

At six-thirty A. M. on the 7th day of February, 1944, John Etzel, an enlisted man in the Armed Forces of the United States Government, was crossing Figueroa Street in the City of Los Angeles, on the south side of Eighth Street. Before stepping down from the curb to the pavement, he looked north and saw a semi-trailer oil truck, belonging to the defendant Standard Oil Company of California, and then driven by one of its employes, the co-defendant Ira Boone. The truck was at a distance of some seventy-five feet from the intersection. It was early in the morning and still dark. The automatic traffic signals were not operating. Etzel stepped into the street and crossed easterly, at all times remaining within the confines of the marked pedestrian zone.

Figueroa Street is fifty-six feet wide at that intersection. At a distance of about twenty-four feet from the curb, Etzel was hit by the truck. It is not clear what portion of the truck hit him. But from the fact that he had a large gash on the side of his head, the inference is justified that he came in contact with the right side of the truck, and that the head injury was caused by the handle of the door. He was thrown to the ground. In addition to the injury to his head, Etzel suffered injuries

to his face and left thigh and had contusions, lacerations and abrasions over his entire body. He was hospitalized and was unable to perform his tasks as a soldier for twenty-nine days.

By this action, the Government seeks to recover the sum of \$192.56. Of this sum, \$123.25 is the cost of Etzel's hospitalization. [14] As to this amount, there is a stipulation that it is the fair and reasonable value of the hospital care necessarily required for Etzel as a result of the injuries suffered. While the stipulation does not concede the necessity for the hospitalization, this fact flows from the obligation of the Government to care for persons in the military service, both under Congressional enactments and Army regulations. (1) The sum of \$69.31 represents the wages paid to Etzel while he was incapacitated. There is no stipulation as to, or proof of, the reasonableness of the amount so paid. But, as the pay of enlisted men is fixed by Section 9 of the Pay Readjustment Act of June 16, 1942] (2) it must be assumed that the wages decreed by the Congress are reasonable.

And disability does not relieve the Government of the obligation to pay the wages prescribed.

We have to determine whether the Government is entitled to recover.

The defendants have challenged this right upon several grounds.

First, we must answer the question whether the Government of the United States has the right to sue for hospitalization and wages paid to a soldier during the time he was incapacitated through the tortious act of another. There are no precedents controlling. Strange as it may seem, the question has not arisen in peace time

or during any of the wars in which large numbers of men were in the active service of the Armed Forces of the United States. There are state court decisions dealing with the status of persons enlisted in the state militia. They do not help. They concerned attempts of persons injured while in the militia to recover under State Workmen's Compensation Acts. The rulings are both ways. Some cases deny the right to recover upon the ground that a person while an [15] active member of a state militia is not an employee. (3) Other cases decide the contrary. (4) Neither group is very persuasive on the question before us.

Workmen's compensation is based upon a theory which places responsibility for injuries upon industry regardless of fault. When applying this doctrine, the inclusion of any person within the beneficiary groups reflects largely the approach of the court to the problem and the range of its interpretation of a specific enactment. A narrow approach restricts the group, while a broad one, having in view the beneficial social aims to be achieved, enlarges it. (5) However, we are not without signposts to guide us in determining the question. And we can do so without adopting the strict theory of master and servant which the Government asserts. For, ultimately, we are confronted with the fact that courts now take a less circumscribed view of the relation than they did in the past. The trend is to hold that almost any association in which a person is subject to the control of another may be considered as a master-servant relation. Courts apply to it, especially when dealing with the harm which third persons may do to it, the rules of liability which would flow from a strict relation of master and servant. (6) At the common law, the master could recover for loss of services resulting from a tort committed

on the servant of a third person. (7) By analogy, a parent was given the right to recover for loss of the services of his child, (8) and a husband for those of his wife. (9) And these actions are entirely independent of the right of the servant, child, or wife to recover for the injuries themselves. (10) [16]

When a man becomes a soldier, a status is created whether the soldier enlisted voluntarily or is selected under a Selective Service law. (11) A voluntary enlistment originates in a contract for a definite period. But there any similarity between it and other contractual relationships, such as master and servant, ceases. The essence of the relation of master and servant is the freedom of the servant to end it, subject, of course, to responsibility for wrongful termination. But even a volunteer cannot withdraw from the army during the period of enlistment. Wrongful ending or even long, unexcused absence, is punishable as a crime both in peace and in war time. (12) The obligations which the Government assumes towards a soldier are more legislative than contractual. The Congress of the United States, in the exercise of its war powers, has either defined those obligations or allowed the army establishment to decree them pursuant to a defined congressional policy. In time of emergency, or war, the distinction between the volunteer and the draftee disappears. The aim of the Congress has been to apply all the rules ordained for the comparatively small army maintained in time of peace to the large citizen's army called up by the Selective Service and Training Act of 1940 and its later amendments. (13) So the upshot of the matter is this: A special relation has been created. Whether we call it a status, as some of the older cases do, or whether we just call it Government and soldier relation, it is clear that both the soldier and the Govern-

ment have certain rights and obligations arising from it and that a third party who, through his tortious act, interferes with it to the detriment of the Government, is responsible for the mischief he causes. And he cannot avoid responsibility [17] for his act by claiming that the relation is one for which the common law did not have a name. The relation is an actuality. And in the light of the modern trend to protect individuals and categories from outside tortious or even non-tortious interference, (14) the Government, which, through the negligent act of a third party, is put to the expense of hospitalizing a soldier and loses his services during a period for which it is compelled to pay him his wages, has a claim cognizable in this court.

An English case which arose during the last war sustains these views. The English Crown sought to recover for medical expenses, hospital treatment and wages of two air craftsmen of the Royal Air Force, who had been injured in a collision. The Crown's right to recover was sustained in these words:

"As regards the claim in respect of wages, it is essentially a claim based upon the old common law principle that a master who has, by the tortious act of a third person, been deprived of the services of his servant may claim damages in respect of that deprivation against the third person who has brought it about. There is not, I think, any doubt that a right of action by a master for the loss of the services of his servant exists and has been recognized from early times. Curiously enough, it has perhaps been kept in activity most frequently as the fictitious basis, and the only basis, for the action of seduction by which the seducer of a woman or girl may be made to pay the penalty of his wrong-doing. [18] The

Solicitor General referred me to several cases based upon that principle, beginning with *Hall v. Hollander*, (4 B & C 660) in 1825; and perhaps most noticeably exemplified in *Evans v. Walton*. (L. R. 2 C. P. 615) It is well settled that when by the tort of a third party a master has lost the services of his servant he can recover damages in respect of that loss of service. The amount of his damages is, of course, dependent upon the facts of the particular case. If he has got a substitute to do the work of the servant, his damages may be the extra cost to which he has been put over and above the payment he makes to the servant who is incapacitated. If he has put an end temporarily to the contract of service of the injured servant and pays him nothing, his damages would be the amount, if any, that he has to pay to the substitute. The payment, if any, that he makes to the substitute may of course be equal to, more than or less than the wage of the injured servant. On the other hand, where he does not employ a substitute, if he continues to pay the wages to the injured servant, he clearly loses any benefit arising from that payment, because he is getting nothing in return for it. In that case, therefore, his damages are, *prima facie*, the amount of the wages that he has thus paid for nothing. This case is of that last mentioned class, and the damages claimed on behalf of [19] His Majesty are the amount of the wages paid to these men during their incapacity. There is no evidence to show that while these men were in fact being paid during their incapacity any extra men were recruited to take their place, or that any payment was made to any other person for doing their

work. Therefore, prima facie, damage has been suffered to the extent of the wages thus paid to them for nothing. So much for the claim in respect of wages.

"As regards medical expenses and hospital treatment, the claim for damages for these expenses is even more simple. It is put upon the ground that the Crown, having in fact expended the amount claimed under this head, ought to be compensated for these expenses by the person responsible for the negligence which rendered them necessary.

"That being the claim which His Majesty would prima facie be entitled to make, the suggested answer is that it is simply a claim by a master for damages for loss of his servant's services and incidental expenses, and that it must be treated and decided on the common law principles applicable to that relationship." (15) (Emphasis added)

It is apparent that the case was decided upon the assumption that the rules of master and servant apply. However, as already indicated, the conclusion must be the same, even if we take into account the dissimilarity between the Government and the soldier inter-relation and that [20] between master and servant. For, after making due allowance for the differences, we still have a cohesive pact which, like the pactum subjectionis,—the pact between king and subject in mediaeval Europe,—ties the soldier to the Government, at the same time reserving to each rights and obligations which flow from their union. Or we might apply to it the word which French jurists have coined to characterize certain solidarities which lie at the basis of social action, institu-

tion. Such institution gives rise to droit institutionnel, a body of right arising from the communality of the group, such as the family, in which each member exercises certain rights and has obligations not as an individual, but as a member of the institution, according to the position he occupies,—*suam cuique dignitatem*. These rights or obligations stem not from the members as individuals, (in the case of the family, parents or children), but from the basic fact which brought it into being, (in the case of the family, marriage). (16)

So, if we bear in mind the wise saying of a French jurist that there is a greater logic than the logic of concepts,—the logic of life and of reality (17), the conclusion is inescapable that the foundational fact of enlistment, whether voluntary or forced, is the bond (vinculum) which brings into being the Government and soldier institution. To the institution so born, and to the Government and soldier, as members of it, certain rights attach. And the most fundamental one is that other shall not, by their wrongful action, interfere with it to the harm of the government.

Rightly. For the Government, after the institution comes into being, assumes a primacy and control over the actions of the other member, the soldier, which is greater than that of the master, husband, or father. Hence, whether we approach the problem with the common law norms in view or on the more latitudinarian basis of social actualities, [21] we are compelled to sustain the Government's right to institute this action. (18) Granted the right to sue, recovery is still dependent on proof of the negligence of the driver, and the absence of contributory negligence on the part of the soldier. It is

almost beyond dispute that the driver of the truck was negligent. He testified to seeing Etzel inside the cross walk. He failed to yield to him the right of way, in violation of the California Vehicle Code. (19) This was an act of negligence on the part of an employe for which the employer, Standard Oil Company of California, is liable. (20) The driver pleaded guilty to violation of the vehicle code and was fined in the Municipal Court of Los Angeles. This plea was admitted into evidence against him only. As an admission of negligence, after the event, it was not binding on the employer. At the oral argument, I pressed the question whether Etzel was guilty of contributory negligence. A review of the facts in the light of the law of California, which governs, leads me to the conclusion that there was no contributory negligence.

The contributory negligence which bars recovery must be a cooperating cause. (21) It appears from Etzel's testimony and that of a disinterested witness who was standing on the curb, that Etzel looked north before stepping into the cross walk. He saw the truck at a distance which made it certain that the driver of the truck would see him and yield to his superior right to cross in a marked cross walk. Had the driver taken ordinary precautions, the distance was sufficient to have allowed Etzel to pass unharmed. The driver testified that he saw Etzel; that, at the time, Etzel was not looking in his direction, but that he thought he would look up in time to see the truck coming. He did not stop his truck or swerve it from its path until it was actually upon Etzel. [22] Having once looked in the direction from which danger was coming and ascertained the position of the truck, Etzel was not bound to continue looking to the north and to the south. Even if he had miscalculated the distance, he

could not be charged with contributory negligence. And the fact that he may have looked in the opposite direction before reaching the center of Figueroa Street, in order to see if automobiles were approaching from that direction, if it was a fault, was not a negligent act co-operating or contributing to the injury.

As said by the Supreme Court of California:

"Respondent testified that before she attempted to cross the street she looked to her left and saw the truck at a distance of approximately 125 feet away, and she calculated she could cross to the street car in safety. We think she had a right to assume that an observance of laws and a reasonable regard for the safety of others on the part of the driver of the truck would not require that she should keep a constant eye upon him under the circumstances of the case. He could have seen her hurrying for the car as did others, and it was his primary duty to have done so." (22) (Emphasis added)

The truth is, as the driver admitted, he took a chance that Etzel would stop in the cross walk, allow him to pass and yield the right of way to him. But he had no right to expect that, because the law required him to yield. So we have the not uncommon case of a driver taking the risk of missing a pedestrian, and, unfortunately, not missing.

One more contention remains to be dealt with. On March 16, 1944, Etzel settled his claim against the two

defendants for the sum of [23] \$300.00. He executed a "release in full" which stated, among other things, "I hereby release and dis harge Standard Oil Company of California and Ira Boone, of and from any and all claims and demands which I now have or may hereafter have", on account of the accident. It is argued that this settlement precludes recovery by the Government. We do not agree. It is true that a single claim for personal injuries cannot be split, and that a release operates as a satisfaction of whatever claims could have been asserted. (23). But these limitations apply only to the claims which the person executing the release has. They do not apply to a claim arising from the same accident which another person may have, independent of the injured person, because of his relationship to him. The cases already cited make it clear that in a case of this character, the two causes of action co-exist and are independent of each other. (24) And as Etzel incurred no loss through hospitalization, and the wages for the period had to be, and actually were, paid to him by the Government, the settlement of his claim was limited to compensation to him for his suffering, consequent upon his physical injuries. (25).

Judgment will, therefore be for the plaintiff.

Dated this 18th day of May, 1945.

LEON R. YANKWICH

Judge [24]

NOTES TO TEXT

1. 54 Stats. 885, 50 U. S. C. A. App. 303(d); Army Regulation 40-505, Sec. 2.
2. 54 Stats. 886, 50 U. S. C. A. App. 303(d), and see: 55 Stats. 800, 10 U. S. C. A. 2; 56 Stats. 363, 37 U. S. C. A. 109.
3. *Hayes v. Illinois Terminal Transportation Co.*, 1936, 363 Ill. 397; 2 N. E. (2d) 309; *Goldstein v. State*, 1938, 281 N. Y. 396; 24 N. E. (2) 97; *Lind v. Nebraska National Guard*, 1944, 12 N. W. (2) 652.
4. *State v. Industrial Commission*, 1925, 186 Wis. 1, 202 N. W. 191; *Baker v. State*, 1931, 200 N. C. 232, 156 S. E. 919; *Globe Indemnity Co. v. Forrest*, 1935, 166 Va. 267; 182 S. E. 215; *Andrews v. State*, 1939, 53 Ariz. 575; 90 P. (2) 995.
5. See my opinions in *Didier v. Crescent Wharf & Warehouse Co.*, 1936, D. C. Calif., 15 Fed. Sup. 91, 93-94; *Trudenich v. Marshall*, 1940, D. C. Wash. 34 Fed. Sup. 486, 487.
6. *Darmour Productions Corp. v. Herbert M. Baruch Corp.*, 1933, 135 C. A. 351.
7. 18 R. C. L., 542; Holdsworth, *History English Law*, 1922, 3rd Ed. Vol. 8, p. 429; *Adm. Commissioners v. S. S. Amerika*, (1917) A. C. 38, 44-49; (per Lord Parker), 53-54 (per Lord Sumner); *Attorney General v. Valle-Jones*, (1935) 2 K. B. 209.
8. *Restatement of Torts*, Sec. 703; 20 R. C. L. 614, 616. [25]
9. *Restatement of Torts*, Sec. 693; 41 C. J. S. Husband and Wife, Sec. 401; *Lansburgh & Bros. Inc. v. Clark*, 1942, U. S. App. D. C. 127 F. (2) 331.

10. 20 R. C. L. 615-616; *Lansburgh & Bros., Inc. v. Clark*, 1942, U. S. App. D. C., 127 F. (2) 331. And see cases cited in Footnotes 7, 8 and 9.
11. 6 C. J. S. Army and Navy, Sec. 21; *In re Grimley*, 1890, 137 U. S. 147; *In re Morrissey*, 1890, 137 U. S. 157; *Selective Draft Law Cases*, 1917, 245 U. S. 366; *U. S. v. Williams*, 1937, 302 U. S. 46; *Falbo v. United States*, 1944, 320 U. S. 549; *Billings v. Truesdell*, 1944, 321 U. S. 542; *Local Draft Board No. 1 v. Connors*, 1941, 9 Cir., 124 F. (2) 388.
12. See sections 1530 and 1533, 50 U. S. C. A. (Articles 58 and 61 of Articles of War of the Armies of the United States).
13. 50 U. S. C. A. App. 301 et seq.
14. *Restatement of Torts*, Secs. 766-767; *Original Ballet Russe v. Ballet Russe*, 1943, 2 Cir. 133 F. (2) 187.
15. *Attorney General v. Valle-Jones*, (1935) 2 K. B. 216-217.
16. *Georges Renard: La Valeur de la Loi*, 1928, pp. 244-248; *Maurice Hauriou: Précis de droit constitutionnel*, 2 Ed. 1929, p. 72 et seq.; *J. Charmont: La Renaissance du droit naturel*, 2nd Ed. 1927, p. 206; *François Gény: Science et technique positif privé*, 1924, IV, pp. 119-125, 153; and see: *Charles Grove Haines: Revival of Natural Law Concepts*, 1930; *Leon R. Yankwich, Back to St. Thomas*, 1930, II Opinion No. IV, p. 6. [26]
17. *Emile Boutroux, La Conscience individuelle et la loi*, *Revue methaphysique et de morale*, 1906, p. 14.

18. This case illustrates the difficulty which we encounter when we try to squeeze social activities into specific legalistic rubrics such as status, contract, quasi-contract, and the like. Even Sir Henry Maine's famous apothegm "The Movement of the progressive societies has hitherto been a movement from Status to Contract", (Sir Henry Maine, *Ancient Law*, Pollock Ed., 1930, p. 182) is no longer accepted by legal scholars as the true index of social progress or progress in law. See: Wm. Seagle, *The Quest of Law*, 1941, p. 252-265.

Sorokin has pointed out that while there have always been certain fundamental types of social relationships, or systems of interaction, they have not remained the same, but have undergone many changes. He, himself, after naming three types,—familistic, contractual and compulsory,—teaches that in the unfoldment of Western culture, institutions may partake of all three with emphasis now on one and then on another.

(Pitrim Sorokin, *Social and Cultural Dynamics*, 1937, Vol. 3, pp. 23-43)

It is, therefore, unrealistic to shut our eyes to actualities merely because they do not fit into accepted legal concepts.

49. California Vehicle Code, Sec. 500(a)
20. California Vehicle Code, Sec. 402(a) [27]
21. Restatement of Torts, Secs. 463-465; *Rush v. Lago-morsino*, 1925, 196 Cal. 308, 314; *Soares v. Barson*, 1936, 12 C. A. (2) 582, 585-586.

22. *McQuigg v. Childs*, 1931, 213 C. 661, 664; and see: *Burgesser v. Bullock's*, 1923, 190 C. 643; *White v. Davis*, 1930, 103 C. A. 531, 541-543; *Maggart v. Bell*, 1931, 116 C. A. 306, 310-311; *Lincoln v. Williams*, 1932, 119 C. A. 498, 502; *Pinello v. Taylor*, 1933, 129 C. A. 508, 513; *Salomon v. Meyer*, 1934, 1 C. (2) 11, 15-16; *Nicholas v. Leslie*, 1935, 7 C. A. (2) 590, 595-596; *Lowell v. Harris*, 1937, 24 C. A. (2) 70, 84; *Vanderpool v. Dunham*, 1939, 35 C. A. (2) 166.
23. *Kidd v. Hillman*, 1936, 14 C. A. (2) 507; *Franklin v. Franklin*, 1945, 67 A. C. A. 830.
24. See cases cited under Footnotes 7, 8 and 9; 41 C. J. S. Husband and Wife, Sec. 401, p. 896. And see: *Lansburgh & Bros., Inc. v. Clark*, 1944, U. S. App. D. C. 127 F. (2) 331, 332, where Groner, C. J. says: "In the prosecution of these separate and independent rights there is no privity, and a judgment against one is not a bar to an action by another." (Emphasis added)
25. The identical contention was rejected in *Attorney General v. Valle-Jones*, (1935) 2 K. B. 209, 215; the Court said:

"As the result of that negligence, the injured man had a claim against the defendant for damages, which in the ordinary case would include any loss of wages during their incapacity and also the cost of any hospital treatment and medical attendance reasonably incurred. The injured men did make a claim against the [28] defendant in which they recovered damages but those damages cannot have included any sum in respect of loss of earnings, because in fact during

the period of their incapacity they continued to receive their pay from their employers, the Royal Air Force; nor did those damages include any expenses of hospital treatment or medical attendance, because these benefits were provided for the men by the Royal Air Force."

[Endorsed]: Filed May 18, 1945. [29]

[Title of District Court and Cause:]

DECISION

The above-entitled cause heretofore tried, argued, and submitted, is now decided as follows:

For the reasons and upon the grounds stated in the opinion filed herewith, judgment is ordered that the plaintiff do have and recover of and from the defendants the sum of \$192.50 with costs herein.

Findings of Fact and judgment to be presented by counsel for the plaintiff in accordance with Local Rule No. 8.

Dated this 18th day of May, 1945.

Opinion filed.

Counsel notified.

[Endorsed]: Filed May 18, 1945. [30]

Standard Oil Company, etc., et al.

JENNINGS & BELCHER

Attorneys at Law

510 South Spring Street

Los Angeles 13, Calif.

MUtual 2258

June 8, 1945

Honorable Leon Yankwich
Federal Building
Los Angeles 12, California

Re: United States vs. Standard Oil Company

My dear Judge:

There has been served upon us Findings of Fact and Conclusions of Law as prepared by the United States Attorney and submitted to the court. We do not desire to go to the extent of filing formal proposed amendments to the Findings of Fact but do desire to direct the court's attention to one matter therein.

In Paragraph III a finding is made that John Etzel was a member of the Army of the United States of America, "and as such, a servant of the plaintiff."

In the written opinion of the court it is specifically laid down (page 3) that the court arrives at its conclusions "without adopting the strict theory of master and servant which the Government asserts."

The opinion (page 4) points out dissimilarities between the Government-soldier and master-servant relationship.

Again it is asserted (page 4) "A special relation has been created." The opinion then points out that the rights of the Government, which the court holds to attach in this case, arise whether it is called a "status" or "Government and soldier relation."

In the light of these statements by the court in its opinion, we wonder whether the court desires to incorporate a specific finding of master-servant in the Findings of Facts and Conclusions of Law. Such a finding seems to us to be at variance with the real determination of the court in this matter.

Respectfully yours,

JENNINGS & BELCHER

By Frank B. Belcher

FBB:BLH

CC—Cameron L. Lillie,
Assistant U. S. Attorney

[Endorsed]: Filed Jun. 15, 1945. [31]

[Title of District Court and Cause.]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on April 24, 1945, before the Honorable Leon Yankwich, Judge of the United States District Court, Los Angeles, California, sitting without a jury, a jury having been waived. Charles H. Carr, United States Attorney, Ronald Walker and Cameron L. Lillie, Assistant United States Attorneys appearing on behalf of the plaintiff, and Frank B. Belcher, Esquire, appearing as attorney for defendants, Standard Oil Company of California, a corporation, and Ira Boone; and oral and documentary evidence having been introduced on behalf of both parties, and the Court having considered the same and heard the arguments of counsel, being fully advised, makes the following findings of fact:

Findings of Fact

I.

That the United States of America is the plaintiff herein, and that this action is brought pursuant to the provisions of Title 28, Section 41 U. S. C. A. [32]

II.

That at all times mentioned in plaintiff's complaint, defendant, Standard Oil Company of California was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, duly authorized to do, and doing business in the State of California. That defendant, Ira Boone is a resident of the County of Los Angeles, State of California.

III.

That John Etzel was during the period from February 7, 1944 to March 6, 1944, a member of the Army of the United States of America, ~~and as such, a servant of the plaintiff.~~ [Note: Words stricken by the Court at the request of counsel for the defendants as per letter dated June 8, 1945 on file. LRY, J]

IV.

That on February 7, 1944, defendant, Standard Oil Company of California, was the owner of a G.M.C. truck, which was then being driven and operated by defendant Ira Boone, as servant and employee of defendant Standard Oil Company of California in the course and scope of his employment, with the knowledge and consent of defendant Standard Oil Company of California.

V.

That on February 7, 1944, John Etzel was in the exercise of due care crossing Figueroa Street in an easterly direction within the confines of the marked pedestrian

walk at the intersection of Figueroa and Eighth Street in the City of Los Angeles, State of California. That at said time and place defendant Ira Boone, acting within the scope of his employment as a servant of defendant, Standard Oil Company of California, negligently and carelessly drove and operated said G.M.C. truck in a southerly direction on said Figueroa Street and caused same to strike John Etzel, who was then within the confines of said pedestrian's walk; that said John Etzel suffered personal injuries as a result thereof. That the negligence of defendant Ira Boone consisted in his failure to yield the right-of-way to said John Etzel, in violation of Section 460(a) of the California Vehicle Code. That the negligence of defendant Ira Boone was the proximate cause of the injury sustained by John Etzel.

VI.

That at the time of said accident and prior thereto, John Etzel was an [33] able bodied man, and that as a result of defendants' negligence and of the resulting injuries to John Etzel, he became subsequently incapacitated, and was confined in a hospital from February 7, 1944 to March 6, 1944. That said John Etzel was physically unable to pursue any work or duties for plaintiff during said period and as a result thereof the services of John Etzel as a member of the Armed Forces were lost to the plaintiff for the said period.

VII.

That under the provisions of the Acts of Congress and the provisions of Army Regulations issued pursuant to the Acts, plaintiff is obligated to pay and did pay John Etzel wages for the period of his disability from February 7, 1944 to March 6, 1944, in the sum of \$69.31. That said sum is the fair and reasonable value of the

services lost by plaintiff during Etzel's period of disability. That under the provisions of said Acts and Regulations plaintiff was obligated to and did provide hospital care to John Etzel during the period of disability in the sum of \$123.25. That said sum is the fair and reasonable value of the hospitalization furnished. That the negligence of the defendants was the proximate cause of the injuries sustained by John Etzel and resulting loss of services sustained by plaintiff, and of the hospital care furnished by plaintiff to John Etzel.

VIII.

That on February 7, 1944, John Etzel was in the exercise of due care in crossing Figueroa Street within the confines of a pedestrian zone. That the injury and damage sustained by plaintiff was not directly or proximately caused or contributed to by the carelessness or neglect of John Etzel.

IX.

That John Etzel released and discharged defendants and each of them from any and all claims and demands accruing to him, arising out of said accident. That John Etzel sustained no loss of earnings and did not pay nor become obligated to pay any sum for hospitalization during the period of his disability. That John Etzel, therefore, had no claim or cause of action to recover from defendants for loss of earnings or the loss of his hospital care. That no claims asserted by plaintiff in the action, have been settled or discharged. [34]

Conclusions of Law

By reason of the foregoing facts, the Court concludes that plaintiff has a cause of action to recover from the defendants the reasonable value of the loss of John Etzel's

services sustained by plaintiff, and the reasonable value of hospital care which plaintiff furnished to John Etzel; that said cause of action is separate, distinct and independent from any cause of action vested in John Etzel, as a result of his personal injuries, and that plaintiff's cause of action was not and could not be affected by the release executed by John Etzel. That plaintiff is entitled to recover from defendants the sum of \$192.56 and plaintiff's cost of suit.

It Is So Ordered and the Council for Plaintiff Will Submit Appropriate Judgment Herewith.

Dated: June 15, 1945.

LEON R. YANKWICH

United States District Judge

CHARLES H. CARR

United States Attorney

RONALD WALKER and

CAMERON L. LILLIE

Asst. U. S. Attorneys

Attorneys for Plaintiff

By Cameron L. Lillie

Assistant U. S. Attorney

Approved as to Form as provided by Rule 7(a).

[Endorsed]: Filed Jun. 15, 1945. [35]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 4204-Y Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
a corporation, and IRA BOONE,

Defendants.

JUDGMENT

The above entitled cause came on regularly for trial on April 24, 1945, before the Honorable Leon R. Yankwich, Judge of the United States District Court, Los Angeles, Calif., sitting without a jury, a jury having been waived; Charles H. Carr, United States Attorney, Ronald Walker and Cameron L. Lillie, Asst. U. S. Attorneys, appearing on behalf of plaintiff, and Frank B. Belcher, Esq., appearing as attorney for the defendants Standard Oil Co. of California, a corp.; and Ira Boone; and oral and documentary evidence having been introduced on behalf of both parties, and the Court having considered the same and heard the arguments of counsel, being fully advised and having rendered Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that the United States of America, plaintiff herein, have and recover of and from the Standard Oil Company of California, a corporation, and Ira Boone, the sum of One Hundred Ninety-two Dollars and Fifty-six Cents (\$192.56), together with costs taxed at \$31.48.

Dated this 15th day of June, 1945.

LEON R. YANKWICH

United States District Judge

Judgment entered Jun. 15, 1945. Docketed Jun. 15, 1945. C. O. Book 33, Page 377, Edmund L. Smith, Clerk, by Louis J. Somers, Deputy.

[Endorsed]: Filed Jun. 15, 1945. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiff Above Named and to Charles H. Carr and Ronald Walker and Cameron L. Lillie, Its Attorneys:

Notice is hereby given that Standard Oil Company of California, a corporation, and Ira Boone, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 15, 1945.

Dated: July 9, 1945.

JENNINGS & BELCHER

By Frank B. Belcher

Attorneys for Defendants

808 Security Building

Los Angeles 13, California

MUtual 2258

[Endorsed]: Filed & mailed copy to Charles H. Carr, Ronald Walker & Cameron L. Lillie, Attys. for Plf. Jul. 11, 1945. [37]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

The parties hereto, under the provisions of Rule 75, Subdivision F, do hereby stipulate that they have designated and do hereby designate the parts of the records, proceedings, and evidence to be included on the record of appeal as follows:

The complaint and answer; the findings of fact and conclusions of law; the letter from counsel for defendants to Honorable Leon Yankwich dated June 8, 1945, and referred to in Paragraph III of the findings of fact and filed June 15, 1945; the opinion of the Trial Judge; the judgment appealed from; the notice of appeal; and the following portions of the evidence introduced at the trial, to-wit:

The stipulation of fact signed by the parties and introduced in evidence concerning the expenditures of the plaintiff for hospital service; the release of John Etzel, the injured man, which was introduced in evidence and marked "Defendants' [38] Exhibit A"; and the following oral testimony by John Etzel, a witness for plaintiff:

"I am and was at the time of the accident a member of the Armed Forces of the United States. I did not enlist but was inducted into the services on February 19, 1941 and I took an oath which was voluntary on my part. Ever since that time I have served continuously in the Armed Forces of the United States. I was injured in an accident which occurred on February 7, 1944. I was in the service at that time. Up to that time I had been able to perform all the necessary duties that had been given to me. As a result of the injuries I was taken to

the Georgia Receiving Hospital and from there they took me to Sawtelle where I remained for twenty-nine days until March seventh. During the time I was in the hospital I was treated for my injuries by doctors.

I was treated by Army doctors. The treatment consisted of taking care of my leg and giving heat treatments and taking stitches out of my head. I had a bad bruised leg and some ten or twelve stitches across my head. During the twenty-nine days I was laid up I was paid my regular compensation by the Government. It amounted to around \$69.00, a little over \$2.00 per day.

Cross-Examination: My entry into the Armed Services was solely as a result of being inducted. I was drafted in. I went through the usual machinery with the Draft Board in my district and as a result of that I ended up in the Army. That was the method in which [39] my entry into the Army was accomplished. I signed the document entitled "Release in Full" of which you show me a photostatic copy. That is my signature on it. I executed that document or the original of which this is a photostat and I received the consideration expressed in the release, to-wit: \$300.00. I kept and retained that sum myself."

It is stipulated that the foregoing constitutes all of the evidence admitted at the trial of this case except the evidence concerning the manner of the happening of the accident in question, which evidence is omitted for the reason that the appellants are not making any point on appeal as to the insufficiency of the evidence either to

prove negligence or the absence of contributory negligence.

The appellants designate as the points on which they intend to rely on appeal the following: That the plaintiff has no cause of action nor any right to recover for the compensation paid to the injured soldier or for the medical or hospital expenditures made by the plaintiff for his treatment; that the injured soldier was not an employee of the plaintiff nor was plaintiff his master nor did the relation of employer or employee exist between them; that the injured soldier executed a complete release which released all right to recover for lost wages or medical or hospital expenses.

The parties respectfully request the Clerk to prepare and transmit to the Appellate Court the record in accordance with this stipulation.

Dated: July 25, 1945.

CHARLES H. CARR,
RONALD WALKER and
CAMERON L. LILLIE

By Cameron L. Lillie

Attorneys for Plaintiff and Respondent

JENNINGS & BELCHER

By Frank B. Belcher

Attorneys for Defendants and Appellants

[Endorsed]: Filed Jul. 25, 1945. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 40 inclusive contain full, true and correct copies of Complaint; Answer, Stipulation of Fact; Defendants' Exhibit A; Opinion; Decision; Letter dated June 8, 1945 to Judge Leon R. Yankwich; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal and Stipulation as to Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$6.85 which sum had been paid to me by appellants.

Witness my hand and the seal of said District Court this 1st day of August, 1945.

[Seal]

EDMUND L. SMITH.

Clerk.

By Theodore Hocke.

Chief Deputy Clerk.

[Endorsed]: No. 11114. United States Circuit Court of Appeals for the Ninth Circuit. Standard Oil Company of California, a Corporation, and Ira Boone, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 2, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals for the
Ninth Circuit

No. 11114

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
a corporation, and IRA BOONE,

Defendants and Appellants.

DESIGNATION OF RECORD AND STATEMENT
OF POINTS UPON WHICH APPELLANTS
INTEND TO RELY ON APPEAL

The appellants do hereby adopt as and for the statement of the points upon which the appellants intend to rely on appeal and as and for a designation of the parts of the record necessary for the consideration thereof, the designation as to the record on appeal and as to the points on which appellants intend to rely, all as contained in the stipulation as to the record on appeal heretofore filed in the District Court of the United States in and for the Southern District of California, Central Division, which said stipulation forms a part of the record on appeal.

JENNINGS & BELCHER

By Frank B. Belcher

Attorneys for Defendants and Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 2, 1945. Paul T. O'Brien,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 11114.

STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, AND IRA
BOONE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon appeal from the District Court of the United States for the
Southern District of California, Central Division

Proceedings had in the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Tuesday, January 8, 1946
Before MATHEWS, BONE, and ORR, Circuit Judges

Order of submission

Ordered appeal herein argued by Mr. H. B. Gaither, Jr., counsel
for appellant, Standard Oil Company of California, and by Mr.
Cameron L. Lillie, Assistant United States Attorney, counsel for
appellee, and submitted to the court for consideration and
decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, February 14, 1946

Before MATHEWS, BONE, and ORR, Circuit Judges

*Order directing filing of opinion and filing and recording of
judgment*

ORDERED that the typewritten opinion this day rendered by this
Court in above cause be forthwith filed by the clerk, and that a
judgment be filed and recorded in the minutes of this court in
accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11114. Feb. 14, 1946

STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, AND IRA
BOONE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon appeal from the District Court of the United States for the
Southern District of California, Central Division

Before MATHEWS, BONE, and ORR, Circuit Judges

BONE, Circuit Judge.

This is an appeal from a judgment of the above mentioned District Court awarding a sum to the appellee, United States of America, for the loss of services to it of a member of its armed forces.

The action grows out of a traffic accident which occurred on February 7, 1944, in Los Angeles, California, in which a truck of appellant, Standard Oil Company, driven at the time of the accident by appellant, Ira Boone, an employee of Standard Oil, collided with and injured John Etzel, a soldier in the Army of the United States. As a result of these injuries Etzel was unable to perform his duties as a soldier for a period of 29 days.

Etzel's pay during the period of his incapacity amounted to \$69.31. He also received army medical care and hospitalization, the reasonable and stipulated value of which was \$123.25. On March 16, 1944 Etzel, in return for the sum of \$300, executed a release in full to both appellants for his personal injuries.

The Government instituted suit in the court below on April 24, 1945 to recover the total of its payments in wages and medical care during Etzel's incapacity (\$192.56), on the theory that "as a result [of the accident] the services of John Etzel were lost to the plaintiff for the aforesaid period [29 days]; and also by reason thereof the plaintiff became liable to pay, and did pay John Etzel as compensation * * * [\$69.31 and] * * * expended for hospital care, the sum of \$123.25." The lower court gave judgment for plaintiff in the total of these two amounts. The judge was of the opinion that the government-soldier relationship is a "status" similar to that of master and servant, parent and child, or husband and wife, and that therefore, the government has a cause of action for loss of a soldier's services similar to

that of a master for loss of the services of his servant, a parent for those of his child, et cetera.

Appellants do not appeal from the trial court's finding that Boone's negligence caused the injury, but from its finding that the government has a cause of action for loss of a soldier's services. This is the question before this court. This case is one of first impression in this country. At the outset we are confronted with the problem of what law should apply. There is no federal statute which might afford the government a means for bringing this action and it has been held that "when the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." *United States v. The Thetis*, 266 U. S. 328, 339, 340, and see *United States v. Moscow-Idaho Seed Co.*, 92 F. 2d 170, 173, 174 (CCA-9). Aside from any federal legislation conferring a right of subrogation or indemnification upon the United States, it would seem that the state rules of substantive common law would govern an action brought by the United States in the role of a private litigant. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 71, 78; *United States v. Moscow-Idaho Seed Co.*, supra, pp. 173, 174.

Appellant maintains that § 49 of the Civil Code of California is controlling and we are inclined to agree. Appellee does not argue the matter in the briefs, but on oral argument government counsel seemed persuaded that the issue must be determined by California law.

As stated above, the government's sole argument in the court below and in this court is that the relation between government and soldier is that of master and servant, or, at least, a relation analogous thereto. The right of a master to sue for the loss of services of his servant is an old remedy at common law. The action appears to have arisen when the basis of society was that of "status" and when there was no procedure in the King's courts for enforcing a simple contract. In that early day, the servant was looked upon as a member of the master's family, and, thus, the action was similar to writs of trespass for injury to a wife or child, or for debauching a wife, daughter, or female servant. See

¹The Court of King's Bench and the High Court of Australia have considered similar cases: *Attorney-General v. Valle-Jones* [1935] 2 K. B. 209, and *The Commonwealth v. Quince* [1944] *Argus Law Reports* p. 50; [1943] *Queensland Law Reporter* p. 31; also, *Queensland Justices of the Peace Issue (Suppl.)*, v. 37, p. 137, December 31, 1943. Although the facts of the Valle-Jones case are similar to those of the case at bar we do not deem the case of help to us on the principal question before this court, i. e., the right of the Government to maintain this action at common law. The court in the Valle-Jones case does not discuss the matter, and on p. 213 of 2 K. B. the report shows that the defendant admitted that the government had a cause of action for loss of services. The Quince case is more helpful on this issue and is mentioned infra. Counsel state that it was not brought to the lower court's attention. In a recent case on a similar state of facts, *U. S. v. Atlantic Coast L. R. Co.* (Jan. 30, 1946), D. C. No. Car., E. D. #271-Civil, Gilliam, J., held contrary to the lower court's opinion in the present case.

Admiralty Commissioners v. S. S. Amerika [1917], A. C. 38, 44, 45, 54 et seq.; Holdsworth, History of English Law, v. 8, p. 429; Wigmore, Interference With Social Relations, 21 Am. L. Rev. 764, 765-769; Green, Relational Interests, 29 Ill. Law. Rev. 460, 1041, 1042;

Today the master-servant relation is generally based on contract. Therefore, the master's cause of action for loss of his employee's services remains as an anomaly in the law for " * * * while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle v. Chicago St. P. M. & O. R. Co.*, 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 249, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621. The law does not spread its protection so far." *Robbins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 309. See also *Admiralty Commissioners v. S. S. Amerika*, supra; *Pollock on Torts* (14th ed., 1939), p. 55; and compare *The Federal No. 2*, 21 F. 2d 313; *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L. R. A. 862; *Hall v. Barber Door Co.*, 218 Cal. 412, 418.

In California the master's cause of action for the loss of an employee's services is defined in the California Civil Code § 49, which section is in full as follows:

"The rights of personal relations forbid:

(a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody;

(b) The seduction of a person under the age of legal consent;

(c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation."

If this section of the Civil Code governs this case, and we believe it does, the government's case must fail for two reasons: first, because the government-soldier relation is not within the scope of § 49 of the Code, and, second, because the government is not a "master" and the soldier is not a "servant" within the meaning of the Code section.

First. The trial judge deleted his finding of fact that a master-servant relationship existed in this case. He stated in his opinion that the action was based on injury to the "status" or personal relationship existing between government and soldier, and that defendant could not escape liability by claiming that at common

law the relationship "did not have a name". See *United States v. Standard Oil Corp.*, 60 F. Supp. 807, 810. The trial judge is evidently of the opinion that the "modern trend" is towards affording protection to rights arising from statutes not protected at common law.² In this court, the government has not adopted the trial court's conclusion that interference with the government-soldier relation, standing alone, is a sufficient basis for this suit. The government still argues, as it did in the lower court, that the government-soldier relation is the same as that of master and servant, or analogous thereto.

Whether or not the government-soldier relation is one protected at common law, it does not seem to be within the scope of § 49, for that section definitely limits the causes of action which are based upon an interference with personal relationships to those enumerated in the section. For example, § 49 might have given a cause of action for injuries to parties to other personal relationships similar to that of master and servant alone, i. e., for injuries to an agent, an independent contractor, a partner, a joint adventurer, et cetera. And even if the government-soldier relationship is the basis for an action at common law, it must be noted that § 49, both as amended in 1905, and in 1939, is in derogation of the common law because other personal relations traditionally protected by that law are withdrawn from the section.³ The court said in *Burlingame v. Traeger*, 101 Cal. App. 365, 371, 281 Pac. 1051: "It must also be borne in mind that 'our codes, of course, were intended as complete revisions of the existing laws upon the subjects embraced therein' (*Estate of Carraghar*, 181 Cal. 15, 183 Pac. 161, 163), and that their provisions establish the law of this state respecting the subjects to which they relate. (In re *Apple*, 66 Cal. 432, 6 Pac. 7; *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255.) It is only when the code and other statutes are silent that the common law governs." For these reasons we do not believe that the government-servant relationship alone is within the scope of § 49 of the Civil Code.

Second. Since we do not believe that the government-soldier relationship is protected by § 49 of the Civil Code, we must next consider the government's claim that the government-soldier relationship is the same as that of master and servant. If this argu-

²The trial court's reliance on the Restatement of Tor. §§ 766, 767, and *Original Ballet Russe v. Ballet Theater*, 133 F. 2d 187, do not bear him out. Those authorities do not discuss negligent injury to a contractual relation of employment, but cases of malicious attempts to hurt plaintiff's business and to induce plaintiff's employees to breach their contracts with plaintiff. Such causes of action follow the celebrated case of *Lumley v. Gye*, 2 E. & B. 216. See *Green, Relational Interests*, supra, pp. 1043, 1044 ff.

³*California Stats.* 1905, p. 68, withdrew the action of a master for the abduction of his servant; *California Stats.* 1939, pp. 1245, 3037, withdrew the action for abduction or enticement of a wife from her husband, and the action for the seduction of a person over legal age.

ment is correct, the government will, of course, be brought within the scope of § 49 (c), which subsection may be termed a definition of the master's action at common law. There are, it is granted, some resemblances between the master-servant and government-soldier relationships, but the distinguishing features are so great that we do not feel that the legislature intended the words "servant" and "master" in § 49 (c) to include within their meaning the words "soldier" and "government."

In modern times the freedom of an employee to enter into and to terminate a contract of employment might be said to be the major distinguishing factor between the two relationships. Labor's many other rights and privileges recognized today serve to distinguish even further the position of the modern employee from that of the soldier. Even in peacetime a soldier who enlists is subject to many strict duties and disciplines which are never impressed on the ordinary employee. See e. g. Articles 58 and 61 of the Articles of War, 10 U. S. C. A. §§ 1530, 1533. But whatever the picture in peace, in times of national emergency it is the duty of the citizen to serve in the protection of his country, and every citizen is a potential soldier under the conscription laws. See *Arver v. United States*, 245 U. S. 366, 378; *United States v. Williams*, 302 U. S. 46, 48; *Falbo v. United States*, 320 U. S. 549, 554; *Billings v. Truesdell*, 321 U. S. 542, 556; *Local Board No. 1 v. Connors*, 124 F. 2d 388 (C. C. A. 9); compare, *The Commonwealth v. Quince*, supra, [1944] *Argus Law Reports*, 50; *Hayes v. Illinois Terminal Transportation Co.*, 363 Ill. 397, 2 N. E. 2d 309; *Goldstein v. State of New York*, 281 N. Y. 396, 24 N. E. 2d 97; *Lind v. Nebraska National Guard*, 12 N. W. 2d 652. Thus the fact that this soldier (Etzel) had entered the army under the draft for the duration of the war emergency makes the position of the soldier even less comparable to that of an employee. The trial judge ably points out the distinctions between soldier and employee at 60 F. Supp. 810. See also *McArthur v. The King (Canada)* [1943] *Ex. C. R.* 77, [1943] 3 D. L. R. 225.

But the government argues that because at common law the relation between master and servant was that of "status" there is a similarity to the government-soldier relationship which is also recognized as a "status". In *re Grimley*, 137 U. S. 147, 151-154; In *re Morrisey*, 137 U. S. 157, 159; *United States v. Williams*, supra, at pp. 48, 49; *Billings v. Truesdell*, supra, at p. 553; see also the dissenting opinions in *The Commonwealth v. Quince*, supra. As the trial court noted, it is strange that in all these years of wars the government has never asserted this cause of action before. The answer may partially lie in the fact that modern, the action

of a master for loss of services is little used.⁴ The fact that a sovereign has only asserted this cause of action at common law in a few recent cases does not, of course, demonstrate that the government cannot come within the scope of the master's action for loss of services. However, it is indicative of the fact.

We are not impressed by the government's attempted analogy between the relations of master and servant and government and soldier based on the theory of "status". There were many relationships based on status at early common law and there are today, i. e., parent and child, husband and wife, citizen and sovereign. To attempt to analogize the two relationships merely because both are based on a "status" seems without merit. And this is so even though there is a right to control and a duty to serve in both of the statutes. See majority opinions, *The Commonwealth v. Quince*, supra. We agree with the trial court that the relationship between government and soldier is more legislative than contractual. See *United States v. Williams*, supra, 302 U.S. pp. 46, 48. For these reasons we cannot conclude that the common law action of a master for loss of his servant's services as defined in § 49 (c) of the Civil Code, or as it stands at common law, may be adopted by the government.

Our disposition of the case makes it unnecessary for us to consider whether the government has asked for the proper damages in this case,⁵ except insofar as the government, in the absence of statutory authority, might have a right of subrogation. "A court of equity may give restitution to the plaintiff and prevent unjust enrichment of the defendant, where the plaintiff's property has been used in discharging an obligation owed by the defendant * * * by creating in the plaintiff rights similar to those which the obligee * * * had before the obligation was discharged." Restatement of Restitution § 162, Comment a.

However, it appears in this case that defendant has already discharged this obligation to the principal party, Etzel. In the United States the prevailing rule seems to be that an injured person may recover for wages lost and medical expenses incurred

⁴ *Darmour Productions Corp. v. Herbert M. Baruch Corp.*, 135 Cal. App. 351 is the only California case involving such action by a master that court or counsel have found. See comment, 23 Cal. Law Rev. 420, which also suggests, among other limitations, that, contrary to the *Darmour Production* case, actions under § 49 should be limited to menial servants. See also, *Green Relations' Interests*, supra, pp. 1042, 1043.

⁵ It seems at common law that the master's action was for the actual losses that he suffered from the inability of his servant to serve, and not for wages and medical expenses paid during the servant's incapacity. "A master also may bring an action against any man for beating or maiming his servant, but in such case he must assign, as a special reason for so doing, his own damage by the loss of his services." *Cooley's Blackstone's Commentaries* (4th ed.) v. 1, p. 367. Cf. *De La Torre v. Johnson*, 200 Cal. 754, 759, 254 Pac. 1105; *Interstate Tel. & Tel. v. Public Service Elec. Co.*, 86 N. J. L. 26, 90 A. 1062; *Philadelphia v. Phil. Transit Co.*, 337 Pa. 1, 10 A. 2d 434; *Chapman Moving & Trucking Co. v. Ross Towboat Co.*, 280 Mass. 282, 182 N. E. 477; *The Federal No. 2*, supra, p. 314.

during his incapacity even though such amounts were supplied by insurance, a contract of employment, or gratuitously.* *Cunnen v. Superior Iron Works*, 175 Wisc. 172, 184 N. W. 767; *Shea v. Rettie*, 287 Mass. 454, 192 N. E. 44, and see notes to these cases in 18 A. L. R. 678 and 95 A. L. R. 571, also see 128 A. L. R. 686; *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wisc. 34, 116 N. W. 633; *Harding v. Town of Townshend*, 43 Vt. 536, 538-542; 4 Restatement of Torts, § 920, Comment c, § 924, Comment c. The California courts have approved this rule. *Peri v. L. A. Junction Ry.*, 22 Cal. (2d) 111, 113; *Gastine v. Ewing*, 65 C. A. 2d 131, 150 P. 2d 26; *Puryell v. Goldberg*, 34 C. A. 2d 344, 350, 93 P. 2d 578; *Beneich v. Market St. Ry. Co.*, 29 C. A. 2d 641, 647; *Inglewood Park Mausoleum v. Ferguson*, 9 C. A. 2d 217; *Reichle v. Hazie*, 22 C. A. 2d 543, 547, 71 P. 2d 849; *Loggie v. Interstate Transit Co.*, 108 C. A. 165, 169, 291 P. 618. Therefore, Etzel's release to the defendants, which extended "to all claims of every nature and kind whatsoever", covered his lost wages and medical expenses as elements of damage. These are the amounts which the United States here seeks to recover.⁷ Thus even if we may assume that the United States may be subrogated, without statutory authority, to the soldier's claims, it cannot be subrogated to such claims here because defendants have already paid Etzel for these losses. For the same reason the government would have no right of indemnification, even under the broad rule of Restatement of Restitution, § 76. Compare § 2772, California Civil Code. In *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry.*, 115 F. 2d 277, and *The Federal No. 2*, supra, 21 F. 2d 313 it is held that in the absence of contractual or statutory right, the party paying wages and medical expenses is not entitled to subrogation or indemnification. Note also the California rule as to releases and splitting causes of action, *Kidd y. Hillman*, 14 C. A. 2d 507, 58 P. 2d 602.

Furthermore, it seems clear that Congress did not intend that for tortious injuries to a soldier in time of war, the government should be subrogated to the soldier's claims for damages. It will be noted that Congress has provided that the government should have the privileges of assignment or subrogation in other and somewhat similar situations. In the Federal Employee's Com-

* In its findings of fact the lower court found that the soldier, Etzel, had no claim against defendants for wages or medical care since these were supplied by the United States. As authority for this finding, the court, in its opinion, cited *Attorney General v. Valle Jones*, supra (1935), 2 K. R. at p. 215. However, it seems the lower court has followed the English rule and not the prevailing American doctrine. See cases cited above, and note comparison of English and American rules in 18 A. L. R. 678 and 95 A. L. R. 571.

⁷ Provision for medical treatment in this case is found in Army Regulations 40-505, and for pay under Pay Readjustment Act of 1942, as amended, 37 U. S. C. A. §§ 101-120, see § 109. The government states that pay during this type of incapacity is not withheld. Compare Army Regulations, 35-1420, par. 3a; 10 U. S. C. A. § 847a; Article of War 107, 10 U. S. C. A. § 1579.

pensation Act, 5 U. S. C. A. §§ 751-800, it is provided that before benefits may be received the government may require the beneficiary to assign to the government his rights against the negligent party or to prosecute the action in his own name. (See § 776.) And by § 797 members of the Officers' Reserve Corps and the Enlisted Reserve Corps of the Army are in time of peace made subject to and given the benefits of the Act. Also the World War Veterans' Act, 38 U. S. C. A. §§ 421-576, makes similar provisions (§ 502) with regard to any cause of action that a person entitled to benefits may have against a third person. Cf. The Steel Inventor, 36 F. 2d 399.

In our opinion authority for this action should come through legislation, and not from an attempt by the courts either to enlarge the scope of an ancient common law cause of action, or to create a new one.

Reversed.

(Endorsed:) Opinion. Filed Feb. 14, 1946. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 11114

STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, AND IRA
BOONE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed.

(Endorsed:) Judgment. Filed and entered February 14, 1946. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, March 29, 1946

Before MATHEWS, BONE, and ORR, Circuit Judges

Order denying petition for a rehearing

Upon consideration thereof, it is ordered that the petition of appellee, filed March 15, 1946, and within time allowed therefor by rule of court, for a rehearing of above cause, be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit

(Title of Cause and Number)

No. 11114

STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION, AND IRA
BOONE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-three (53) pages, numbered from and including 1 to and including 53, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. J. Howard McGrath, Solicitor General of United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22nd day of May, 1946.

[SEAL]

(S) Paul P. O'Brien,
PAUL P. O'BRIEN, Clerk.

Supreme Court of the United States

No. 235—October Term, 1946

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.